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RECEIVED

MAR 13 2023

OFFICE OF
WATER

329 Pierce Street, Suite 200
Sioux City, IA 51101

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March 10, 2023

**Via Electronic Mail
and U.S. Mail**

Water Management Board
South Dakota Department of
Agriculture and Natural Resources
Attn: William Larson, Chairman
523 East Capitol Ave.
Pierre, SD 57501-3182
DANRmail@state.sd.us

Copy to:

Ann Mines Bailey
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Ann.MinesBailey@state.sd.us

Re: Declaratory Ruling - Chicoine

Dear Mr. Larson:

Please see the enclosed Petition for Declaratory Ruling on behalf of the McCook Lake Recreation Area Association. Please let us know when the matter will be set before the Board so we can move forward with publishing the required notices. Thank you.

Sincerely,



John M. Hines
For the Firm

RECEIVED

MAR 13 2023

OFFICE OF
WATER

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF)	
THE MCCOOK LAKE RECREATION)	PETITION FOR
AREA ASSOCIATION'S PETITION)	DECLARATORY RULING
FOR A DECLARATORY RULING)	
ON SDCL CHAPTER § 46-1)	

The McCook Lake Recreation Area Association (the "Association") hereby petitions the South Dakota Water Management Board (the "Board") to issue a Declaratory Ruling on the applicability of SDCL Chapter 46-1 pertaining to the factual situation presented herein:

1. The authority by which the petition is presented: SDCL § 1-26-15; SDCL § 46-2-5; SDCL § 46-5-10; ARSD 74:02:01:03; and ARSD 74:02:01:46.
2. The name of the group submitting the petition: The McCook Lake Recreation Area Association, a South Dakota nonprofit corporation.
3. The requested action: For the Board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a "canal") requires a permit to appropriate water.
 - a. SDCL § 46-1-1 states: "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."
 - b. SDCL § 46-1-3 states: "It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law."

- c. SDCL § 46-1-10 states: “Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board.”
 - d. SDCL § 46-1-15 states: “Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so.”
4. The reason for the requested action is described in additional detail in the letter sent from the Association to the Board dated December 5, 2022, attached hereto as Exhibit “A” and incorporated by reference herein.
- a. In short, the reason the Association seeks the Declaratory Ruling is because representatives of the South Dakota Department of Agriculture and Natural Resources (“DANR”) have told the Association that the expansion of a public lake by a private party does not require a permit to appropriate water.
 - b. After DANR’s statements to the Association that no permit to appropriate water is required to expand a public lake, DANR Chief Engineer Eric Gronlund testified in opposition to 2023 HB 1134 before the South Dakota House Agriculture and Natural Resources Committee.
 - c. 2023 HB 1134 requires the consent of a majority of lakefront property before a permit may be issued to alter the shoreline.
 - d. It was Mr. Gronlund’s testimony that HB 1134 “potentially circumvents any opportunity for a full hearing on the merits of an application” and that “a well-

established water rights procedure affording the opportunity for meaningful public participation and public hearing is potentially being upended.”

- e. Mr. Gronlund’s testimony to the Agriculture and Natural Resources Committee and DANR’s statements to the Association are inconsistent with one another.
- f. 2023 HB 1134, which was supported by the Association, was developed in response to DANR’s previous statements that no water rights permit was required for a private party to expand a public lake.
- g. The Association agrees with Mr. Gronlund’s testimony that before a private individual can permanently alter a public body of water for private gain, meaningful public participation and public hearing is required by the plain language of South Dakota law.
- h. SDCL § 46-1-3 states explicitly that “the right to the use of water may be acquired by appropriation as provided by law.” (Emphasis added).
- i. Expanding a public body of water, via canal or otherwise, uses the water of the public water body, and the right to do so may only be acquired by a permit for appropriation.
- j. The procedure for obtaining a permit to appropriate water includes the opportunity for public input.
- k. Because the people of South Dakota have a “paramount interest” in the use of all water of the state, no private party should be allowed to permanently alter a public lake for private gain without first receiving State and public approval through the appropriation permit procedures.

1. The Association respectfully asks that the Water Management Board issue a Declaratory Ruling that the alteration of a public water body by a private party requires a permit for appropriation of water, consistent with Mr. Gronlund's testimony to the Agriculture and Natural Resources Committee and consistent with State law.

Dated this 17th day of February, 2023.

CRARY, HUFF, RINGGENBERG,
HARTNETT & STORM, P.C.

BY



Cody M. McCullough
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ATTORNEYS FOR PETITIONER,
MCCOOK LAKE RECREATION
AREA ASSOCIATION

William Larson, Chairman
Water Management Board
South Dakota Department of
Agriculture and Natural Resources
523 East Capitol Ave.
Pierre, S.D. 57501-3182
December 5, 2022

Re: Chicoine Canal

Chairman Larson:

I am writing on behalf of the McCook Lake Recreation Association (MLA) to request a "Declaratory Ruling" requiring Mike Chicoine to obtain a water right permit for the taking of water from McCook Lake (Lake) for the purpose of developing a canal off of the Lake. Furthermore, we request the Mike Chicoine Water Right Permit be subservient to the Water Right Permits of MLA. Presently MLA has two permits for pumping water out of the Missouri River (Permits 5878-3 and 6479-3 for a combined capacity of 26.74 cfs). The proposed Chicoine Canal (Canal) will impact the MLA permits by taking water from McCook Lake.

Mike Chicoine (Chicoine) has applied for several permits to construct a canal off of the southeast end of McCook Lake with features as follows:

- Length: 2,050 l.f. (Secretary Robling assures us the length of the canal is 1,500.)
- Width: 90 ft. at a water surface elevation of 1090. (McCook Lake has not been able to reach the water surface elevation of 1090 in recent years).
- Bottom width: 42 ft.
- Bottom Elevation: 1082 ft. (Below the recent spring water level in McCook Lake prior to the start of MLA pumping.)
- Side slope: 3:1

I have attached a copy of the "Application for Shoreline Alteration of a South Dakota Public Water Body" as prepared by Chicoine for details illustrating the above information.

McCook Lake is an Ox-Bow of the Missouri River. The McCook Lake Association and the Izaak Walton League of McCook Lake have spent over \$10 million in dredging and constructing a pumping system. The McCook Lake Association spends over \$60,000 per year for pumping water from the Missouri River. As stated above, MLA has two water right permits allowing the pumping of 26.74 cfs through a MLA constructed 7000 foot, 24 inch pipeline to McCook Lake.

During the summer of 2022 the 26.74 cfs was pumped continuously without raising the water level to elevation 1088 until rainfall events assisted the pumps.

Pumping resulting in a water level in McCook Lake that is approximately 10-11 ft. above the Missouri River water surface elevation (as measured at the pumping station). Attached is a graph of the water level monitoring over the last nine years. This graph shows how MLA pumping annually raises the Lake from a recent spring Lake level that is slightly below the bottom of the Canal. If the Canal existed in 2022, water would not have entered the Canal until the MLA pumps were placed in operation. Any ground water around the Canal would be the result of MLA pumping. The seepage rate is about 2 inches per day from predominantly the southern shoreline and south end of the Lake. Previous borings by the State of South Dakota indicated the northern and eastern shoreline and bottom are clay soils with lower seepage rates. During the summer the evaporation rates are about 0.25 inches per day.

MLA functions on donations and volunteerism. The Association does not have funds for expanding the pumping or pipe capacity to accommodate the Canal.

In 1978, the State of South Dakota published a study titled: "Ground Water Study for Southern Union County" by Derric L. Isles. Attached is a "Map Showing Water Table Contours" prepared by Derric Isles (Map). Derric provided arrows indicating the direction of ground water flow as previously discussed in this letter. The southeast end of the Lake has the steepest hydraulic gradient due to the shorter distance to the Rivers. The extension of the Lake by a Canal is believed to increase the hydraulic gradient out of the southeast end of the Lake resulting in greater seepage losses from the Lake.

The Canal will increase the surface area of the Lake and result in an increase in evaporation. The water will be taken from McCook Lake.

Additionally, the Canal will bring the Lake closer to an irrigation well owned and operated by Mike Chicoine. We believe the Canal will feed the cone of depression created by the operation of the Chicoine irrigation well increasing the impact on McCook Lake.

We believe the Laws of South Dakota protect the water rights of its citizens and should be applied in this situation. SDCL 46-1-1 states: "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."

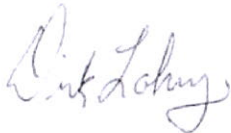
The Canal will result in the appropriation of water from McCook Lake to meet the evaporation and seepage losses from the Canal. The Canal should be required to comply with SDCL 46-1-1. In wet years MLA may have the ability to supply water to the Canal. In dry years, MLA cannot meet the needs of the Lake if a canal is built. The MLA records indicate that in dry years as presently being experienced, the Canal would not have water without MLA pumping. The MLA pumps are not able to provide the Canal design water at any elevation but especially a surface elevation of 1090.

Taking of the Lake water is a taking from the MLA water right which must be appropriated as required by law. SDCL 46-1-3 states: "It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of the water may be acquired by appropriation as provided by law".

Especially applicable for the Canal is SDCL 46-1-15 which states "Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so."

We ask that Mike Chicoine be required to obtain a water rights permit and the Chicoine permit is subservient to the water rights of MLA.

Sincerely,



Dirk Lohry, President
McCook Lake Association
417 Lakeshore Drive
McCook Lake, SD 57049
712-251-6819
DirkLohry@aol.com

Cc: Ron Duvall

FIRST JUDICIAL COURT

Return # 23918
Process # C23-00147
Docket #
Reference #

STATE OF SOUTH DAKOTA
COUNTY OF UNION

State Of SD Department Of Agriculture & Natural
Resources Water Management Board

Plaintiff,

- VS -

MICHAEL JAMES CHICOINE (Chicoine, Mike)

Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I hereby certify that on the **21st day of February, 2023**, a **Petition for Declaratory Ruling**, in the above entitled action, came into my hand for service. That on the **28th day of February, 2023** at **9:03 PM**, in said county, **I did serve the documents on MICHAEL JAMES CHICOINE.**

By then and there delivering to and leaving with: **CHICOINE, MICHAEL JAMES** at **32926 482nd Ave, Jefferson, SD 57038**


Item	Amount Owed	Amount Paid
Mileage Fee	\$20.40	\$0.00
Sheriffs Fee	\$50.00	\$0.00
	Total Owed	\$70.40
	Total Paid	\$0.00
	Uncollectible	\$0.00
	Remaining	\$70.40

Invoice # 23-00324
Crary, Huff, Ringgenberg, Hartnett & Storm, P.C.
P.O. Box 27, 329 Pierce St., Ste. 200, Sioux City, IA 51102

Comments

Date Returned 3/1/23

Signed


Deputy Cody Braun
Union County Sheriff's Office
209 East Main, Suite 250
Elk Point, SD 57025
Phone: (605) 356-2679
Fax: (605) 356-3356

Date

3/1/2023

FIRST JUDICIAL COURT

Return # 23953
Process # C23-00146
Docket #
Reference #

STATE OF SOUTH DAKOTA
COUNTY OF UNION

State Of SD Department Of Agriculture & Natural
Resources Water Managment Board

Plaintiff,

- vs -

Dakota Bay, LLC

Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I hereby certify that on the **21st day of February, 2023**, a **Petiton for Declaratory Ruling**, in the above entitled action, came into my hand for service. That on the **10th day of March, 2023** at **6:51 PM**, in said county, I **did serve the documents on Dakota Bay, LLC.**

By then and there delivering to and leaving with: **CHICOINE, MICHAEL JAMES (Dakota Bay, LLC)** at **32926 482nd Avenue, Jefferson, SD 57038**

Item	Amount Owed	Amount Paid
Mileage Fee	\$22.90	\$0.00
Sheriffs Fee	\$50.00	\$0.00
	Total Owed	\$72.90
	Total Paid	\$0.00
	Uncollectible	\$0.00
	Remaining	\$72.90

Invoice # 23-00323
Crary, Huff, Ringgenberg, Hartnett & Storm, P.C.
P.O. Box 27, 329 Pierce St., Ste. 200, Sioux City, IA 51102

Comments

Date Returned **3/13/23**

Signed


Deputy Cody Braun
Union County Sheriff's Office
209 East Main, Suite 250
Elk Point, SD 57025
Phone: (605) 356-2679
Fax: (605) 356-3356

Date

3/14/2023